APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 10054 Civil

BOROUGH OF MOOSIC, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

Order Allowing Intervention of the City of Scranton as a Party Plaintiff, and Denying Intervention of the City of Pottsville as a Party Plaintiff.

This cause coming on to be heard on the motion of the City of Scranton and the City of Pottsville for leave to intervene as parties plaintiff, and the court having considered said motion and the complaint tendered therewith, and it appearing to the court that the said City of Scranton should be permitted to intervene, as prayed, and the court being duly advised in the premises,

It is ORDERED that the City of Scranton has leave to intervene in this cause, and is hereby made a party to this cause, and to that end said intervenors' complaint, insofar as it is applicable to the City of Scranton, be deemed filed, all to the end that said party may participate herein in the same manner and in like effect as if an original plaintiff; and

It further appearing that the City of Pottsville is not located in this district, and the United States of America and the Interstate Commerce Commission having objecting to parties raising their objections to these I.C.C. proceedings other than in the Southern District of New York,

It is further ORDERED that the application of the City of Pottsville to intervene as a party plaintiff is denied.

/s/ MICHAEL H. SHERIDAN
United States District Judge

Dated: July 11, 1967.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 10054

BOROUGH OF MOOSIC, *Plaintiff*,

MILTON J. SHAPP and CITY OF SCRANTON, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, NEW YORK CENTRAL RAILROAD COMPANY, and PENNSYLVANIA RAILROAD COMPANY, *Intervening Defendants.*

Before: Van Dusen, Circuit Judge, and Sheridan and Nealson, District Judges

Memorandum Sur Motions of Defendant and Intervening Defendants for a Stay

PER CURIAM July 13, 1967

This action seeks to enjoin permanently, set aside and annul these June 9, 1967 (served June 12) Orders of the Interstate Commerce Commission under 28 U.S.C. § 1336:

A. Pennsylvania Railroad Company-New York Central Company Merger 21989-90 (hereinafter I. C. C. Penn-Central merger proceedings)—see Appendix 1 to Complaint.

B. Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Finance Docket

21510 et al. (hereinafter I. C. C. N & W-Nickel Plate merger proceeding)—see Appendix 2 to the Complaint.[1]

This case is now before the court on motions of defendant and intervening defendants for a stay of all proceedings. The background of the I. C. C. proceedings and court cases leading up to the application for a stay of proceedings is summarized in *Erie Lackawanna Railroad Co.* v. *United States,* 259 F. Supp. 964 (S. D. N. Y. 1966); *B. & O. R. Co.* v. *United States,* 386 U.S. 372 (1967); *Erie-Lackawanna Railroad Company* v. *United States of America et al.,* ... F. Supp. ... (S. D. N. Y. 66 Civ. 2860, 2903 & 2914, Memorandum Order of 7/3/67).[2] On the morning of July 7, 1967, the I. C. C. postponed the effective date of the inclusion order covering the Erie-Lackawanna Railroad Company (E-L), Delaware and Hudson Railroad Company (D & H), and the Boston and Maine Corporation (B & M) in the I. C. C. N & W-Nickel Plate merger proceeding pending its decision on petitions for reconsideration of the June inclusion order in the N & W-Nickel Plate merger proceedings by B & M and D & H.

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[1] An order of the I. C. C. permitting the Chesapeake & Ohio Railway Co. (C & O) to control the Baltimore and Ohio Railroad Company (B & O), which "owns 38% of the voting control of the Reading Company which in turn controls" Central Railroad of New Jersey (see 386 U. S. 372, at 383), was sustained in *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19 (E. D. Mich. 1963), aff'd. 375 U. S. 216 (1963). The C & O-B & O systems seek to merge with the N & W system into a single system, which has offered "to include" E-L, D & H, B & M, The Reading Company and CNJ "therein subject to various conditions" (see 386 U. S. 372 at 384).

[2] Related proceedings pending in the U. S. District Court for the Southern District of New York are Erie-Lackawanna Railroad Co. v. United States and Norfolk and Western Railway Co., No. 67 Civ. 2362, and Delaware and Hudson and Boston and Maine v. United States, No. 67 Civ. 2451.

These mergers have been considered by the I. C. C. as incident to what the Supreme Court of the United States has described as "the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *County of Marin* v. *United States,* 356 U.S. 412, 417-8 (1958), which was quoted with approval in *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 387 (1967).

The Supreme Court of the United States has emphasized the need for expedition of all litigation challenging the Penn-Central merger, using this language in *B. & O. R. Co.* v. *United States,* supra, at 392:

> "The Penn-Central merger has been studied for a decade. Indeed, the parties to the merger agreed to it over five years ago and it has been under Commission consideration ever since that time. This is, of course, the more reason for expedition. We note and give weight to the estimates of the Commission that the inclusion proceedings of the three roads in the N & W should be concluded in 'a relatively short time.' Our remand should, therefore, entail only a very short delay before the Commission. If its order is attacked in court the hearing there can be expedited, as was this one, and an early determination made."

At the hearing on the above Motion on July 7, the United States and the Interstate Commerce Commission stipulated of record that as defendants in the above-mentioned civil atcions pending in the United States District Court for the Southern District of New York, they would make no objection to, and would welcome, the intervention of plaintiff in this action as an intervening plaintiff there prior to the July 17 deadline established by that court in its July 3 Memorandum Order and that, in the interests of prompt dispatch of the important federal judicial litigation, which is involved in this case, plaintiff's complaint

should be considered by the above-mentioned New York Federal Court. Trial counsel for the City of Scranton and Mr. Shapp, who have been active intervenors in the New York Federal Court since the inception of 66 Civ. 2860, is also one of counsel for plaintiff. An examination of the complaint filed in this action (VIII A on pages 5-10) discloses that it is virtually identical with the complaint of such intervening plaintiffs in 66 Civ. 2860 insofar as such complaints attack the Penn-Central merger. Subsections y-bb (four subparagraphs) of this Complaint, which are not in the Complaint in 66 Civ. 2860, challenge inclusion of the New Haven Railroad in the merger and the failure to consider reported earnings of Penn-Central for the first three months of 1967. No reason has been shown why these matters cannot be raised in 66 Civ. 2860 before July 17.

Also, many of the issues covered by this complaint may be covered by the scheduled final hearing to be held before the New York Federal Court on September 18, 1967. In the Memorandum Order of July 3, 1967, this language appears:

> "The Supreme Court made it clear that the issues of 'the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties,' *ibid.*, remained for final determination in this actions . . . If the actions remain pending for the grant of relief which the N & W and its allies want, especially for what, as will hereafter appear, we consider relief that may go beyond the Supreme Court's mandate, they are pending for other purposes as well.
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> "Each plaintiff or intervening plaintiff in such actions shall file and serve on or before July 17, 1967 a supplemental complaint setting forth in what respects it ob-

jects to the order in F. D. No. 21989 as this now stands and *what further relief it seeks.* [Emphasis supplied.]

It is not clear exactly how many issues challenged by the attack made in VIII B and C (pages 10-12) of this complaint will be considered at the New York Federal Court's final hearing on September 18. However, the above-quoted language from the July 3 Memorandum Order makes it likely that most, if not all, of them will be so considered if they are raised in supplemental complaints or an intervening complaint filed by the plaintiff on or before July 17.[3] An application to modify the stay of proceedings in this case may be made, if appropriate, after August 8, when the supplemental complaints and briefs of the moving parties have been filed in the New York Federal Court cases. Also, it is noted that the basic attack in this complaint is on the Penn-Central merger and plaintiff contends the railroads in its Borough (E-L and D & H) were forced to apply to participate in the N & W merger by the Penn-Central merger proposal.

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[3] In footnote 9 on page 949 of *New York Central Railroad Company* v. *United States,* 200 F. Supp. 944 (S. D. N. Y. 1961), it is noted that Professor Moore believes that an intervenor's complaint may expand the issues presented by the original plaintiff, even though that court reached a different conclusion on the facts of that case. It may be that avoidance of a multiplicity of suits concerning these two larger mergers will justify requiring a party such as this plaintiff to intervene, both in the New York Federal Court as well as in the Virginia Federal Court (Norfolk and Western Ry. Co. v. United States, C. A. 67-C-51-R in W. D. of Va.—Roanoke Div.), since the actions in both those courts, which are more convenient to the litigants who produced most of the documents and records in the administrative proceedings being attacked, were instituted prior to this action. If parties such as plaintiff are required to litigate their challenges to administrative orders affecting large numbers of persons over large areas in one or two centrally located courts, it would seem likely that Professor Moore's rule would be applied at least in such cases. In any event, it may well be necessary to limit this action to matters which are not permitted to be raised in the New York Federal Court.

The venue language of 28 U.S.C. § 1398 does not preclude the granting of a stay in a proceeding to enjoin an order of the I.C.C. in view of this language of the Supreme Court of the *United States in Kansas City Southern Ry.* v. *United States,* 282 U.S. 760, 763-4 (1931):

> "The question is thus one for the sound discretion of the District Court, in which such a suit is brought, to determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of an earlier suit for the same purpose, *to the end that there may not be a multiplicity of suits without substantial reason.* . . . [Emphasis added.]

Both the Supreme Court of the United States and the United States Court of Appeals for the Third Circuit have stated that the rule that "the court which first has possession of the subject must decide it" is "salutary." See *Smith* v. *McIver,* 22 U.S. 532, 535 (1824); *Crosley Corporation* v. *Hazeltine Corporation,* 122 F. 2d 925, 929-930 (3rd Cir. 1941). In the latter case, Judge Maris used this language at page 930:

> "It is of obvious importance to all litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. . . . The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy.

> Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties."

Cf. *Popkin* v. *Eastern Airlines, Inc.*, 204 F. Supp. 426, 432-3 (E. D. Pa. 1962). See, also, authorities cited at pages 16-18 of defendant's Memorandum attached to its Motion To Stay Further Proceedings. In footnote 3 of the Memorandum Order of July 3, 1967, the New York Federal Court pointed out:

> "3. Once we entertained E-L's suit to enjoin the merger, actions in other districts seeking the same relief might well have been stayed by those courts on the United States' stipulating not to contest venue here. See Kansas City Southern Ry. v. United States, 282 U.S. 760, 763-64 (1931); New York Central R. R. v. United States, 200 F. Supp. 944, 950-51 (S.D.N.Y. 1961)."

For the foregoing reasons, a stay of all proceedings will be granted at this time until October 1, 1967 (approximately two weeks after the September 18 final hearing date) or further order of this court, with leave granted to any party or amicus curiae to apply for modification of such stay if future circumstances justify such application.

It is not necessary to rule at this time on defendant's suggestion that the stay provide that plaintiff's and intervenor-plaintiffs' complaints will be dismissed with prejudice if they do not seek to intervene or file supplemental complaints in the above New York Federal Court litigation.

Plaintiff and defendant are requested to give the court a report on the status of other litigation concerning the I. C. C. orders attacked in this case and of all court litigation concerning them no later than September 5, 1967.

In view of the terms of 28 U.S.C. § 2323 and the statements in the record showing that the following are parties

to the relevant I. C. C. proceedings, they have been permitted to intervene in this proceeding:

Milton J. Shapp, as a party plaintiff

City of Scranton, as a party plaintiff

New York Central Railroad Company, as a party defendant

Pennsylvania Railroad Company, as a party defendant

Interstate Commerce Commission, as a party defendant

However, all parties must recognize that the above-mentioned litigation was commenced in the New York and Virginia (footnote 3) Federal Courts before the institution of this suit and their rights may be affected if they do not seek to intervene promptly in one or both of those proceedings. Also, additional consequences may be applicable to Mr. Shapp and the City of Scranton if they fail to press their claims in the New York Federal Court since they have been parties to that proceeding for almost a year.

Since the City of Pottsville is not located in this District (28 U.S.C. § 1398) and the defendant has objected to parties raising their objections to these I. C. C. Orders other than in the Southern District of New York, its application to intervene must be denied.

The application of the City of Philadelphia cannot be granted until it files and serves a copy of its proposed Answer to be attached to its Motion. See F. R. Civ. P. 24(c).

FRANCIS L. VAN DUSEN, C. J.
MICHAEL H. SHERIDAN, J.
WILLIAM J. NEALSON

July 13, 1967

APPENDIX C

Judiciary Act. Title 28, United States Code:

Section 2323.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23 and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

Section 1253

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Federal Rules of Civil Procedure

Rule 24(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in any action: (1) when a statute of the United States confers an unconditional right to intervene; . . .